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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 338

CARROLL FRANKLIN JOHNSTON, AN INFANT, BY REBECCA L. GERMAN, HIS NEXT FRIEND AND GUARDIAN, AND REBECCA L. GERMAN, IN HER OWN RIGHT,
Petitioners,

vs.

W. F. JOHNSTON, MAMIE L. JOHNSTON, LUCY J. IDEN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

ROBERT A. MCINTYRE,
MINITREE JONES FULTON,
Counsel for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

To the Honorable Chief Justice and Associates of the Supreme Court of the United States:

Your petitioners, Carroll Franklin Johnston, an infant, by Rebecca L. German, his next friend and guardian, and Rebecca L. German in her own right, file this their petition for writ of certiorari to review a final decree entered in this cause on March 13, 1944, by the Supreme Court of Appeals of Virginia, the highest Court of that State. A printed Transcript of the Record of this cause is filed herewith, marked "Exhibit A," and is made a part of

this application for writ of certiorari in compliance with Rule 38 of this Honorable Court, together with the required additional copies thereof.

History of Cause, and Summary Statement of Matters Involved.

1. On November 30, 1938, your petitioners instituted a suit in *equity* in the Circuit Court of Fauquier County in the State of Virginia, against the above named defendants and R. C. Iden, Elizabeth Johnston, F. Ray Johnston and Elizabeth Johnston, his wife, and F. Ray Johnston and R. C. Iden, Administrators of Manley Allen Johnston, deceased, claiming to be his next of kin and heirs at law, he having died intestate leaving an estate valued at more than $95,000.00 (R. 16, 17).

2. The purpose of the suit was to establish that your petitioner, Carroll Franklin Johnston, an infant, was the son and only child of Manley Allen Johnston and said Rebecca L. Johnston, now Rebecca German, and as such was his heir at law, and distributee of his said father's said estate, and that he inherited the same and was entitled thereto, subject only to the marital or dower right therein of his said mother, Rebecca L. Johnston, now German, and to quiet their title in and to said estate, and for general relief (R. 13-18); and that Rebecca L. German, formerly Johnston, the mother of your infant petitioner, Carroll Franklin Johnston, was the common law wife of Manley Allen Johnston (sometimes referred to in the Record as Allen Manley Johnston).

3. Thereupon said Circuit Court decreed that Complainants "do proceed to take their evidence and otherwise prepare the cause for hearing" (Decree, R. 19-20), which they did in part, and the evidence *then* taken is set out in the R. 21-29.

4. Your petitioners then, by leave of Court, filed their Amended Bill of Complaint so as to make it conform to the proofs already taken and for additional relief, and, among other things, asked for the specific performance of an undertaking of Manley Allen Johnston, the father of your infant petitioner, to give him, his only child, Carroll Franklin Johnston, a good education, put him through High School, and what he, Manley Allen Johnston, had when he died, and for general relief prayed for in both the original and amended Bills; and it was, thereupon, decreed that "the proofs already taken be retained and that the defendants have leave to file their answer, demurrer, motion to strike, or such other pleadings as they may be advised" to said Amended Bill (R. 94-95).

5. The defendants then *demurred* to said Amended Bill on the grounds:

"(1) That the allegations made therein were insufficient in law, vague, indefinite, and constituted conclusions of law rather than * * * of facts; (2) that it contained no allegation which gave rise to any cause of action in contract, or tort, or otherwise; (3) that it alleged no undertaking or covenant by said Manley Allen Johnston binding upon him or the defendants; (4) that it did not allege any consideration to support any undertaking or covenant intended to be alleged in the Amended Bill of Complaint; and (5) that it is conjectured by defendants that complainants intend to allege the existence of a contract and breach thereof by Manley Allen Johnston, and that the Amended Bill of Complaint, therefore, endeavored to state an entirely new case foreign to the case alleged in the Original Bill and one which cannot be prosecuted in this cause" (R. 95-96). The defendants *also filed their Plea* to the Amended Bill *in which they simply denied* that said Manley Allen Johnston, or his agent, *had ever signed any*

contract, memorandum or note in writing agreeing to give the complainant, Carroll Franklin Johnston, a "good education" or to put him "through High School," and what he, the said Manley Allen Johnston, had when he died (R. 96). They never filed an answer thereto; but *only denied in their said Plea that he had signed a contract in writing,* etc. So, that the *Amended Bill of Complaint* was taken for *confessed,* except in so far as the above Plea denied that Manley Allen Johnston *had signed any such contract, memorandum or note in writing* (R. 95-96).

6. The said Circuit Court, on February 6, 1942, then entered a decree sustaining said demurrer, on the *Second, Third* and *Fourth* grounds thereof; and, in effect, overruled the First ground of the demurrer and thereby held that the Amended Bill was sufficient in law and alleged a cause of action in your petitioners against the said defendants; *but* the said Circuit Court, nevertheless, *dismissed* said cause, to which action your petitioners excepted (R. 97-99).

7. Thereafter your petitioners appealed to the Supreme Court of Appeals of Virginia; and, on April 26, 1943, it handed down an opinion holding that said decree appealed from "*was not a final decree,* but was interlocutory", and *remanded the cause* to the Circuit Court, "with leave to the parties to prosecute and defend their respective rights therein, and to be further proceeded in to *final* decree as though said appeal had never been granted" (R. 99-101). The effect of the said decree of the Supreme Court of Appeals of Virginia was to overrule and to reverse the said final decree entered by the Circuit Court of Fauquier County sustaining said demurrer and dismissing said cause, and to *require* defendants to proceed and take evidence to establish their defenses, if any they had. The printed opinion of the said Court of Appeals, on that Ap-

peal, is set out in the R. 99-101, and is reported in 181 Va. at pages 357-358.

8. Thereafter complainants, your petitioners, finished taking their evidence (R. 109-124; 132-195). The defendants, however, *never itnroduced any evidence*, and on *October 26, 1943*, the said Circuit Court entered a *final* decree holding that, * * *

> "the defendants having indicated to the Court that they did not consider it necessary, *and did not propose to take any evidence*, this cause was argued by counsel on the 18th day of October, 1943; and the Court having heard the argument of counsel, took said cause under advisement, and the Court now having reached an opinion regarding the issues of this cause, and being of the opinion that the complainants have wholly failed to establish the existence of *any* common law marriage between Manley Allen Johnston, deceased, and the complainant, Rebecca L. German, (formerly Edmonds) and that the relationship between said parties was purely meretricious, and that no marriage of *any* kind or character existed between the parties, not even such a marriage 'deemed null in law,' as would legitimate the issue under Section 5270 of the Virginia Code, has been established, doth adjudge, order and decree that the bill and amended bill in this cause be and the same are hereby dismissed; to which ruling of the Court, and the entry of this decree, complainants by counsel except" (R. 196-197).

Final Decree of the Supreme Court of Virginia Appealed From.

9. Your petitioners thereupon appealed from the said *final* decree of the Circuit Court to the Supreme Court of Appeals of Virginia (R. 102-131); and, on *March 13, 1944*, it entered a *final decree* in said cause refusing to grant said appeal, and dismissed said cause (R. 197), and thereby affirmed the above decree of the Circuit Court of Fauquier

County entered on October 26, 1943, and thus deprived your petitioner, Carroll Franklin Johnston, an infant, and the *only* child of his father, Manley Allen Johnston, deceased, of his property and his lawful right to take and inherit the estate of his father who had died intestate, and also of his legitimacy; and also deprived your petitioner, his mother, the common law wife of Manley Allen Johnston, of her marital or dower right and interest in the estate of her husband, the said Manley Allen Johnston, and deprived them of the equal protection of the law and of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, the laws of the land, and of the Statute of Virginia, Code of Virginia, 1942, Sections 2 and 5270.

Value of Estate in Controversy.

10. The amount of money in controversy exceeds the sum of $3,000.00, exclusive of interest.

The time for filing the petition for certiorari in this cause was extended to and including August 12, 1944, by Honorable Harlan F. Stone, Chief Justice of the United States, on June 9, 1944 (R. 198).

Questions Involved and Presented and Reasons Relied On for Allowance of Writ of Certiorari Herein.

A. The Supreme Court of Appeals of Virginia, in its final decree of March 13, 1944, affirming said final decree of said Circuit Court of Fauquier County entered on October 26, 1943, has erred in holding, that no common law marriage had been entered into between your petitioner, Rebecca L. German, and Manley Allen Johnston, and that Carroll Franklin Johnston, their only son and child, was not their legitimate issue, and has thereby deprived your petitioners, Carroll Franklin Johnston, an infant, and Rebecca L. German, his mother and the widow of Manley Allen Johnston,

of their property and property rights in the estate of which Manley Allen Johnston died seized and possessed, in violation of the Code of Virginia, 1942, Annotated, Section 2 continuing the common law of England in force in Virginia, and Section 5270, which provides: "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate", and the decision of this Court, *Meister* v. *Moore*, 96 U. S. 76, and in violation of the Fourteenth Amendment to the Constitution of the United States, which provides: * * * "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or *property*, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. The Supreme Court of Appeals of Virginia, in its said final decree of March 13, 1944, has rendered a decision in conflict with the decisions of the Courts of last resort of the other States and in conflict with the applicable decisions of this Court, especially *Meister* v. *Moore*, 96 U. S. 76, holding "that a marriage regularly made according to the common law without observing statutory regulations, is a valid marriage."

C. The Supreme Court of Appeals of Virginia, in its final decree of March 13, 1944, has disregarded the statute law of Virginia, Code of 1942, Sections 2, 5117, 5264, 5269 and 5270, and decided important questions of statutory and general law in a way probably *not* tenable and in conflict with the great weight of authority.

D. The Supreme Court of Appeals of Virginia, in its said final decree of March 13, 1944, has erroneously decided that your petitioner, Carroll Franklin Johnston, is not the "legitimate issue" of Manley Allen Johnston and

did not inherit his estate upon his death, contrary to the said State statute, and the presumption of general law in favor of legitimacy, and contrary to the weight of all the evidence, which was uncontradicted, and to law and the great weight of authority, and with the very right and justice of the cause,—and has thereby deprived your petitioners of their property and the due, just and regular administration of the law, and has arbitrarily disregarded the statute laws of Virginia, set at naught the contract and status of marriage between Manley Allen Johnston and Rebecca L. Edmonds (now German), and held that your petitioner, Carroll Franklin Johnston, is not the "legitimate issue", son and heir at law of his proven and admitted father, Manley Allen Johnston, and has thereby deprived your petitioner, Carroll Franklin Johnston, an infant, of his lawful right to inherit his father's estate, and his mother, Rebecca L. Johnston (now German), of her dower interest therein in violation of law and the Fourteenth Amendment of the Constitution of the United States.

E. The Supreme Court of Appeals of Virginia, in its final decree of March 13, 1944, has erroneously held that Manley Allen Johnston and Rebecca L. Edmonds (now German) did *not have the right* to contract or enter into a common law marriage, either in Virginia or the District of Columbia or in the other States where they lived together as man and wife, which right of contract was not denied to them by any statute, but was denied to the courts of Virginia under Title 2, Section 2 of the Statute law,—Code of Virginia,—and has thereby deprived your petitioner, Carroll Franklin Johnston, their infant son, without any fault of his, of his legitimacy and the right to inherit the estate of his father, Manley Allen Johnston, upon his death, and has also deprived his mother of her dower right in said estate in the absence of any positive State law declaring

that common law marriages are invalid or void. Said final decree is in conflict with the holdings of this Honorable Court. *Meister* v. *Moore, supra.*

F. The Supreme Court of Appeals of Virginia, in its said final decree of March 13, 1944, has failed to give effect to its own State statute, Sections 2 and 5264, 5269 and 5270 of the Code of Virginia, 1942, Annotated (enacted in 1775), in so far as the same applies to the legitimacy and right of inheritance of your petitioner, Carroll Frances Johnston, an infant, and has rendered a decision in conflict with the said statute which provides: "The issue of marriages deemed null in law * * * shall nevertheless be legitimate", and with its own decision construing and holding that said Statute, Section 5270, "legitimatizes the issue of common law marriages" (*McClaugherty* v. *McClaugherty*, 180 Va. 51 at 64), and has thereby deprived your petitioner, Carroll Franklin Johnston, the legitimate issue and heir at law of his father, of his estate and the benefit and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of Virginia at Richmond, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case, entitled on its docket, Carroll Franklin Johnston, an infant by Rebecca L. German his next friend and guardian, and Rebecca L. German in her own right, Petitioners, vs. W. F. Johnston, Mamie L. Johnston his wife, non-resident defendants, Post Office address 414 Berkshire Street, Oak Park, Illinois, Lucy J. Iden, R. C. Iden her husband, Elizabeth Johnston, F. Ray Johnston and Elizabeth Johnston his wife; and F.

Ray Johnston and R. C. Iden, administrators of Manley Allen Johnston, Deceased, Defendants, and that the final decree of the said Supreme Court of Appeals of Virginia may be reviewed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray.

This August 11th, 1944.

CARROLL FRANK JOHNSTON,
An infant,

By REBECCA L. GERMAN,
His next friend and Guardian,
and
REBECCA L. GERMAN,
In her own right,

By ROBERT A. McINTYRE,
Masonic Building,
Warenton, Virginia;
MINITREE JONES FULTON,
1128 Mutual Building,
Richmond 19, Virginia,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

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No. 338

CARROLL FRANKLIN JOHNSTON, AN INFANT, BY REBECCA L. GERMAN, HIS NEXT FRIEND AND GUARDIAN, AND REBECCA L. GERMAN, IN HER OWN RIGHT,

Petitioners,

vs.

W. F. JOHNSTON, MAMIE L. JOHNSTON, LUCY J. IDEN, ET AL.

BRIEF FOR PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the Supreme Court of Appeals of Virginia on the first appeal is reported in 181 Va. 357, 25 S. E. (2d) 274, and is set out in the Transcript of the Record at pages 99-101. No opinion of the Supreme Court of Appeals on the *second appeal* was rendered, but the *final* decree of March 13, 1944, is set out in the Transcript of the Record at pages 196-197.

II.

Jurisdiction.

1. The jurisdiction of the Court is invoked under Judicial Code, Section 237, as amended by the Act of February 13, 1925.

Some of the cases sustaining the jurisdiction of this Court are: *Meister* v. *Moore, etc.*, 6 Otto. 76, 96 U. S. 76, 24 L. Ed. 826; *Press Pub. Co.* v. *Monroe*, 164 U. S. 367; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 859 at 861.

2. The date of the final decree sought to be reviewed in the petition for writ of certiorari is March 13, 1944, and is set out in the Transcript of Record at page 197, and the time for filing the petition for certiorari in this cause was extended to and including August 12, 1944, by Hon. Harlan F. Stone, Chief Justice of the United States, in June 9, 1944 (R. 198).

3. The suit was in equity and was brought to establish: (1) that Carroll Franklin Johnston, an infant, was the son and only child of Manley Allen Johnston, now deceased, and Rebecca L. Johnston (now German), and as such was the next of kin, sole heir at law and distributee of his said father's estate and inherited it under the laws of descendents of Virginia, Sections 5264 and 5270 of the Code of Virginia, 1942, subject only to the marital or dower right therein of his said mother, Rebecca L. Johnston (now German), and to quiet his title in said estate and for general relief and (2) to show that said Rebecca L. Johnston, the mother of the infant petitioner, Carroll Franklin Johnston, was the common law wife of said Manley Allen Johnston when coition took place, and that your petitioner, Carroll Franklin Johnston, as such legitimate issue of Manley Allen Johnston became the owner of his estate at his death,

subject only to the dower right of his said mother, Rebecca L. Johnston, therein, under the general law and especially under Section 5270 of the Virginia Code, 1942, which declares: "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate", of which estate and property the petitioners were deprived by the said final decree of the Supreme Court of Appeals of Virginia and denied the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, which, among other things, provides that, "no person * * * shall be deprived of his * * * property without due process of law; nor denied the equal protection of the law.

III.

Statement of Cause.

1. A summary history and statement of the cause, the issues, and the jurisdictional questions presented, have been set out in the Petition for Writ of Certiorari under the heading, "History of Cause and Summary Statement of Matter Involved", on pp. 2-5, which statement is here adopted and is asked to be read as if set out herein in totidem verbis, and in the interest of brevity will not be repeated at this point, further than to recite briefly some of the pertinent and uncontradicted evidence.

2. The evidence further showed that Manley Allen Johnston, a well to do farmer and about 35 years of age, met Rebecca L. Edmonds (referred to in the caption of this cause as Rebecca L. German, her present husband's name), then a beautiful girl 15 years old, and became so attracted to her that he thereafter hired and induced her father to leave the farm at the Plains in Fauquier County, Virginia, where he was then employed and living happily with his

family, and move on to one of the farms of said Manley Allen Johnston in said County, where he frequently visited them and saw, courted, wooed and won her heart and love, and became engaged to marry her (R. 23, 25, 26-27), and entered into a common law marriage with her when she was a young girl 16 years old.

Excerpts of Evidence

The uncontradicted testimony of Mrs. Rebecca L. German (R. 26-27) shows:

> "Q. Then what occurred? You will have to be plain and tell just what happened.
>
> A. Well, at that time I was so much in love with Allen that I didn't think anything was wrong he wanted me to do. He wanted to talk about getting married, but I thought so much of him I didn't want to turn his people against him on my account so that is the first time we had intercourse together and from that time we was the same as man and wife.
>
> * * * * * * *
>
> "Q. You speak as your having been the same as man and wife, will you please be perfectly candid and open about this thing and tell what you mean by 'you were the same as man and wife'?
>
> A. Well, after that night the next day Allen went away and bought me a wedding ring and he came back and when I went to milk he came down to meet me and put it on my finger and told me that we was just as much married as we could ever be.
>
> Q. What kind of ring was it?
>
> A. It was a white gold wedding ring with four little diamonds across the top.
>
> Q. Was it a band ring?
>
> A. Yes, sir.
>
> Q. Did he put it on your finger himself and tell you that it was your wedding ring?

A. Yes, sir.
Q. And how old were you then?
A. Sixteen.

. . . . . .

"Q. Did or did it (ring) not have anything inside, engraved or otherwise? (Parenthesis ours.)
A. Yes, sir, it did.
Q. Please state what it was?
A. It was initials in the inside 'From A. M. J. to R. L. J.'
Q. And he told you that was your wedding ring?
A. Yes, sir.
Q. Now from that time out, what were the other relations, if any, between you, simply as lovers or otherwise?
A. No, sir, it wasn't as lovers, it was man and wife. We lived as man — wife. I loved him and I thought he was my husband and I knew he knew I was his wife.
Q. Well, were there any further sexual relations between you and him from that time?
A. Yes, sir.
Q. And how long did those relations continue?
A. Until he died.
Q. Well, was Mr. Johnston kind to you and did he provide you with what you needed?
A. Yes, sir, he gave me more than I needed."

Testimony of Mrs. Aneliza Edmonds, R. 148:

"Q. Well, you might go on and tell what did happen?
A. Well, he (Johnston) claimed him and her got married. That was before the baby was born. (Parenthesis ours.)
Q. Did he say anything about having given her a wedding ring?
A. He gave her a ring, yes, Sir.
Q. Did you see the ring on her finger?
A. Yes, sir."

Thereafter Manley Allen Johnston held her out and introduced her "as his wife", treated her "as his wife", supported her, and they lived together "as husband and wife" in Virginia, District of Columbia, Baltimore, Maryland, and New York, and kept house "as man and wife". Their child, Carroll Franklin Johnston, was born to them as a result of their said common law marriage, and Manley Allen Johnston as long as he lived recognized this child as his. (R. 35-38; 41-42; 44-46; 55-61).

When Rebecca L. Johnston went to a hospital, gave birth to their only child, Carroll Franklin Johnston, Manley Allen Johnston went there and *then* recognized their said infant was *his* child, paid all the hospital bills (R., pp. 30-32, 35-38, 41-42), and thereafter he supported, gave money to, and provided for them as his wife and son as long as he lived, undertook to give his son a good education, put him through High School, and repeatedly stated that he wanted him to have whatever estate he, Manley Allen Johnston, his father, owned when he died. (R., *41-42,* 28-31, 32, 37-38, 43-47, 48, 54-58, 61, 80, 84, 91, 110-111, 114, 117-120, 148-149, 151-152, *156,* 170, *192*-193). The above evidence was uncontradicted and conclusively established a common law marriage, certainly for the purpose of legitimatizing the issue.

The defendants did not introduce any evidence whatever. (See "Judgment", R., pp. 196-197).

Under the above cited evidence, and the Virginia statute, Code, 1942, Annotated, Sections 5269 and 5270, and the decisions of the Supreme Court of Appeals of Virginia, even if the common law marriage between Rebecca L. Johnston (nee Edmonds) and Manley Allen Johnston should be regarded "null in law" as between them for want of a license and a civil or religious ceremony, such marriage was nevertheless legitimate *as to the issue of such common law marriage,* Carroll Franklin Johnston.

IV.

Specification of Errors.

1. Under the heading, "Questions Involved and Presented and Reasons Relied on for the Allowance of the Write of Certiorari Herein", the errors have been given in the petition for the Writ at pages 6-9, and in the interest of brevity they are not repeated, but are here adopted as if set out in *totidem verbis*.

In addition the Supreme Court of Appeals of Virginia has erred in holding:

2. That no common law marriage or marriage of any kind ever existed between the said Manley Allen Johnston and said Rebecca L. Johnston (nee Edmonds), father and mother of your petitioner, Carroll Franklin Johnston.

3. That your petitioner, Carroll Franklin Johnston, was *not* the "legitimate issue" of a common law marriage between Rebecca L. Edmonds and Manley Allen Johnston who had since died intestate, and that the petitioner, Carroll Franklin Johnston, did *not* inherit his father's estate, under the Virginia Statute of descents, Code of Virginia, 1942, Annotated, Section 5264, which provides: "Course of descents generally.—When any person having title to any real estate of inheritance shall die *intestate* as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, as are not alien enemies, in the following course: First. *To his children* and their descendants", and Sections 5269 and 5270 of the Virginia Code, 1942, Annotated, the latter of which declares: "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."

4. That Manley Allen Johnston and Rebecca L. Johnston (nee Edmonds) did *not* have *the right to* contract or enter into a common law marriage, which right was not denied

to them by any statute; and which right is embraced in the conception of liberty as guaranteed by the Constitution. *Allgeyer* v. *La.*, 165 U. S. 578; 41 L. Ed. 832 at 836-837; *Lochner* v. *N. Y.*, 198 U. S. 45; *Adair* v. *United States*, 208 U. S. 161.

5. In holding that Carroll Franklin Johnston, an infant, the sole child and issue of said common law marriage, was *not* the "legitimate issue" of Manley Allen Johnston and did not inherit the estate of his said father, who died intestate, and that his mother, Rebecca L. Johnston (nee German), was *not* entitled to dower in the said estate. These holdings are in violation of Title 2, Chapter 2, Section 2, and Sections 5117, 5264, 5269 and 5270 of the Code of Virginia, 1942, Annotated, and of the Fourteenth Amendment to the Constitution of the United States, and contrary to the applicable decisions of this Court. In *Meister* v. *Moore*, 96 U. S. 76, this Court held: "In the absence of any State statute declaring that marriages not celebrated in the manner therein prescribed shall be void, *that any marriage regularly made* according to the common law, without observing the State statute regulations, *is a valid marriage.*"

V.

Summary of Argument.

POINT A. The conclusive evidence introduced in this case, the statute laws of Virginia, the decisions of the Supreme Court of Appeals of Virginia, the highest court of that State, and the decisions of the Supreme Court of the United States and other Federal Courts, all show that the petitioner, Carroll Franklin Johnston, the infant son and innocent and unoffending offspring of the common law marriage entered into between Manley Allen Johnston and Rebecca L. Johnston (herein referred to as German), has been deprived, by the final decree of the Supreme Court of Ap-

peals of Virginia entered in this cause, of his legitimacy, his right to inherit the property and estate of more than $95,000.00, of which his father, Manley Allen Johnston, died seized and possessed, and intestate, and has thereby denied him the equal protection of the law, the statute laws of the State of Virginia as construed by the decisions of the Supreme Court of Appeals of that State, its highest court, and the decisions of this and other Federal Courts, and of the Courts of last resort of other States, and is in violation of the Fourteenth Amendment of the Constitution of the United States, which, among other things, provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due proces of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Point B. This suit was brought in equity to establish: (1) that a common law marriage had been entered into between Manley Allen Johnston (now deceased) and Rebecca L. Johnson (nee Edmonds) in the State of Virginia; and (2) that Carroll Franklin Johnston was the infant son, only child and the legitimate issue of Manley Allen Johnston, now deceased, and Rebecca L. Johnston (now German) by their said common law marriage, and as such inherited his said father's estate under the laws of descents, Code of Virginia, 1942, Annotated, Section 5264, which provides: "When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass * * *: First. To his children and their descendants", and under Sections 5269 and 5270 of said Code, which provide: "The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."

POINT C. Under this Statute, Carroll Franklin Johnston, the infant, is the legitimate issue of said common law marriage, even if it should be regarded, by the courts of Virginia, as "null in law" as between Manley Allen Johnston and Rebecca L. Johnston (nee Edmonds) for want of a license and a civil or religious ceremony.

This has been so held by the Supreme Court of Appeals of Virginia in *Goodman* v. *Goodman*, 150 Va. 42 at 45-46, where it is said:

> "(2) These statutes are remedial in their nature and should be liberally construed. When so construed it is apparent that the object and purpose of their enactment was to remove the stain and disabilities of bastardy from all 'innocent and unoffending' children who for any cause might be classed as illegimate. * * *
>
> Section 5269 should be read in the light of the other two sections. * * *
>
> (3, 4) Every marriage is either *valid or invalid*, and section 5269 does *not* declare that the marriage between the man and the woman *shall be a valid marriage in order to legitimate a child born before the marriage. Since section 5270 legitimates children born after the celebration of a void marriage, it seems clear* that the word 'intermarry', which appears in section 5269, is used in its broadest sense *and was intended to include every marriage, valid or void, entered into* in accordance with the forms and ceremonies of the law, *even though one of the parties was incapacitated to enter into the marriage contract.*"
>
> • • • • • • •
>
> "The case of *Stegall* v. *Stegall*, Fed. Cas No. 13351, 2 Brock. 258, was decided by Chief Justice Marshall in the Circuit Court of the United States for the District of Virginia and North Carolina, in 1825. The case arose in Virginia, and the Virginia statute in force at the time, substantially the same as the present statute, provided as follows: 'Where a man having by a woman one or more children shall afterwards intermarry with such

woman, such child or children, if recognized by him, shall be thereby legitimated. The issue also in marriages deemed null in law shall nevertheless be legitimate.' Va. Code 1919, section 19, page 357." Id. page 50, where the Court further said:

"It is a general and well-settled principle in the law of marriage that if one of the parties is at the time the lawful wife or husband, as the case may be, of another person, the marriage is void as between the contracting parties, * * *.

"*But the fact that such a marriage will be void as between the parties to it*, or that the guilty one of the contracting parties will have committed the crime of bigamy under section 1216 of the statutes, *does not necessarily mean that the children begotten and born before such marriage shall not be legitimated by the marriage, or that such children will be denied the right to inherit from their father under the statute of descent and distribution.*" 3 Ruling Case Law, Sec. 3, pages 723-4.

In *McClaugherty* v. *McClaugherty* (decided Sept. 9, 1942) 180 Va. 51 at p. 64, the Supreme Court of Appeals of Virginia, construing said statutes, 5269 and 5270, said:

"These decisions of the Supreme Court of Appeals of West Virginia, and dicta of the distinguished judges of our own Supreme Court of Appeals, concurred in by the entire court, are each entitled to much respect. *They concur in construing section 5270 to legitimatize the issue of common law marriages.* This construction is supported by sound reasoning from the Virginia decision. There is *no Virginia authority to the contrary.*

"*To deny* the protection of this section *to the innocent and unoffending offspring of common law marriages*, requires the most narrow and technical construction of the phrase 'marriage deemed null in law', *defeats* the *intention of the Legislature* as determined by our *Virginia* court, and *violates* the principle of liberal construction laid down by them."

• • • • • • •

> "If the Legislature has legalized children begott-n in open fornication where there is *no* marriage, *or* semblance of marriage, it is a reasonable presumption that they at the same moment, and by the same clause, meant also to include the offspring of marriages, which, though void in law, and unfortunate, may be nevertheless excusable and even innocent."

and at page 65 said:

> "I am, therefore, of the opinion, that complainant is the *legitimate* daughter (here it would be son) of the defendant, and as such is now entitled to reasonable support and maintenance from him", * * *.

POINT D. The above authorities show that the petitioner, Carroll Franklin Johnston, the infant child and legitimate issue of the common law marriage between Manley Allen Johnston and Rebecca L. Johnson (nee Edmonds), has been denied the protection of the above State statutes and deprived of the estate which he inherited from his father as those statutes have been construed by the Supreme Court of Appeals of Virginia itself. There was no opinion handed down by that Court in this cause, and the State Court appears to have overlooked its former decisions construing the above State statutes,—and has denied the petitioner, the infant child, the benefit and the equal protection of the said State statutes as construed by its own decisions. This Honorable Court in construing said statutes is not bound by the final decree of the Supreme Court of Appeals of Virginia here complained of, but will look to the language, substance and intent of the statutes and the construction placed upon them by the Supreme Court of Appeals of Virginia in its above decisions, and will give effect to the State statute as applied, construed and enforced by the State in its said decisions. *St. Louis Sw. Ry. Co.* v. *Ark.*, 235 U. S. 350 at 362, 39 S. Ct. 99, 59. L. Ed. 265; *Hoover F. Ins. Co.* v. *Harding,* 272 U. S. 494 at 509-510, 47 S. Ct. 179, 71 L. Ed. 372, 49 A. L. R. 713.

POINT E. The final decree of the Supreme Court of Appeals of Virginia is also in conflict with all the evidence, which is conclusive, and established a common law marriage between Manley Allen Johnston and Rebecca L. Johnston, under all the law and authorities. They hold that:

> "No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required; and as marriage is said to be a contract jure gentium, that consent is all that is required by natural or public law." 2 Kents Commentaries, 13 Ed., p. 87.

The authorities all hold that if the contract of marriage, whether per verba de praesenti or de futuro, be followed by cohabitation and consummation it is a valid marriage in the absence of all civil regulations to the contrary, which the parties cannot dissolve. In *Meister* v. *Moore*, 96 U. S. 76, 24 L. Ed. 826, this Court held:

> "In the absence of any positive State statute declaring that all marriages not celebrated in the manner therein prescribed shall be void, that any marriage regularly made according to the common law without observing the statute regulation, is a valid marriage. * * *
>
> "As before remarked, the (State) statutes are held merely directory; because marriage is a thing of common right; because it is the policy of the State to encourage it, and because, as has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law.
>
> "The Michigan statute differs in no essential particular from those of other States which have generally been so construed. It does not declare marriages void which have not been entered into in the presence of a minister or a magistrate. It does not deny validity to marriages which are good at common law." (Parenthesis supplied.)

What this Court said supra as to the Michigan statutes is equally true as to the Virginia statutes, which do not expressly inhibit common law marriages. But, be this as it may, the Virginia statute, Section 5270, supra, expressly recognized common law marriages in Virginia for the purpose of making the issue of such marriages legitimate, and this even though they "be deemed null in law, or dissolved by a court." This statute includes common law marriages. It was so held by the Supreme Court of Appeals of Virginia in *McClaugherty* v. *McClaugherty* quoted *supra* at page 24.

Jewell v. *Jewell*, 42 U. S. 108, 1 How. 234, this Court said:

> "If the contract be made per verba praesenti and remains with cohabitation, or if made per verba de futuro and be followed by consummation it amounts to a valid marriage which the parties * * * cannot dissolve, and is as equally binding as if made in facie ecclesiae."

Certainly, as to Carroll Franklin Johnston, the sole child and issue of the common law marriage between Manley Allen Johnston and Rebecca L. Edmonds, made per verba de presenti as well as per verba de futuro, accompanied and consummated by cohabitation (R. 26-27, 148).

"The equal protection of law is equal protection to all based upon justice under the law." *Pierre* v. *State of La.*, 59 S. Ct. 536, 306 U. S. 354, 83 L. Ed. 757, reversing *State* v. *Pierre*, 180 So. 630, 189 La. 764.

A common law marriage is one by mutual consent; and an implied contract of marriage is as binding and effective as one entered into by written or spoken words. *Ackerman* v. *Ackerman*, 115 Fed. 124, 52 C. C. A. 568, 4 Bigelow Ins. Cas. 181; *U. S.* v. *Route*, 33 Fed. 246. A common law marriage may be established by an inference from the

facts of living together as man and wife, cohabitation, admissions and statements of the parties, and holding themselves out as man and wife to the public. *Hamlin* v. *Grogan*, 257 Fed. 59, 168 C. C. A. 227; *Payne* v. *Payne*, 295 Fed. 970, 54 App. D. C. 149. In the instant case Manley Allen Johnston repeatedly admitted and stated that he and Rebecca L. Johnston were man and wife, but, if he had denied such marriage, it would not have prevented the petitioner, Carroll Franklin Johnston, from being the legitimate issue of such marriage or prevented him from inheriting his father's estate.

POINT F. Under the final decree of the Supreme Court of Appeals of Virginia here complained of the petitioner, Carroll Franklin Johnston, the innocent child and issue of the said common law marriage, is denied the equal protection of the statute because children born of common law marriages entered into in Virginia are denied legitimacy and the right of inheritance under that final decree: whereas children born of common law marriages in other States would be legitimate and inherit the estate located in Virginia of their parents under common law marriages entered into in other States. Carroll Franklin Johnston, therefore, one of the petitioners, has thus been denied by the final decree of the Supreme Court of Appeals of Virginia the equal protection of the State statute—laws of Virginia, Sections 5269 and 5270, and deprived of his right to inherit his father's estate, and as the innocent issue of a common law marriage has also been denied justice under the law, and the benefit and protection of the Fourteenth Amendment of the Constitution of the United States which provides that no State shall deprive any person of property or deny to any person within its jurisdiction the equal protection of the law. As was pointed out supra, pp. 19-22, Sections 5269 and 5270 of the Code

of Virginia, 1942, Annotated, do not declare or require that the common law marriage between a man and a woman shall be valid in order to legitimatize a child born of that marriage, but Section 5270 of the Code of Virginia expressly provides: "The issues of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."

POINT G. It is respectfully contended that a common law marriage having been entered into between Rebecca L. Edmonds and Manley Allen Johnston, and each of them having held themselves out to the public as man and wife, and having lived together as such from the time of their said common law marriage until his death, that she under the laws of Virginia, Code, Section 5117, was entitled to her dower in one-third of all of the real estate of which her husband died seized and possessed, and in his personal property left after the payment of his debts.

Conclusion.

For the above reasons and law, it is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the said final decree and decision of the Supreme Court of Appeals of Virginia and finally reverse it.

Respectfully submitted this August 11, 1944.

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ADDENDA.

State Statute.

Virginia Code of 1942, Annotated.
Title 2, Chapter 2, Section 2:

> "The common law.—The common law of England, so far as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the General Assembly."

"Section 5117. Of what a widow shall be endowed.—A widow shall be endowed of one-third of all the real estate whereof her husband, or any other to his use, was, at any time during the coverture, seized of an estate of inheritance," * * *.

"Section 5264. Course of descents generally.—When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in parcenary to such of his kindred, male and female, as are not alien enemies, in the following course:

First. To his children and their descendants."

"Section 5269. When marriage legitimates children.—If a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, if recognized by him before or after marriage, shall be deemed legitimate."

"Section 5270. Issue legitimate, though marriage null. The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate."

(36)

FILED
SEP 15 1944
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 338.

CARROLL FRANKLIN JOHNSTON, an Infant, By Rebecca L. German, His Next Friend and Guardian, and REBECCA L. GERMAN, in Her Own Right, *Petitioners*,

v.

W. F. JOHNSTON, MAMIE L. JOHNSTON, LUCY J. IDEN, ET ALS., *Respondents*.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR CERTIORARI.

WALTER H. ROBERTSON,
ELLIOTT MARSHALL,
Counsel for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF OF RESPONDENTS OPPOSING PETITION FOR CERTIORARI.

To the Honorable, The Chief Justice of the United States, and the Justices of the Supreme Court of the United States:

The respondents submit this, their brief, in opposition to the granting of a writ of Certiorari to the Supreme Court of Appeals of Virginia pursuant to a petition filed on August 12, 1944.

STATEMENT OF THE CASE.

The petition and supporting brief contain statements of the facts and pleadings of the case, and we find it undesirable to make any further detailed statement thereof. There are certain facts and circumstances not dealt with in the petitioners statement which we shall, for the sake of clarity and convenience, postpone until we deal with the same under the several divisions of our argument.

ARGUMENT.

1.

Petitioners Failed to Cause Timely Service of Notice of Filing Petition for Certiorari on Counsel for Respondents.

It will be seen from the records of the clerk of this court that the petition for certiorari was filed on August 12, 1944. Service of notice of filing the petition together with copies of the petition, printed record and supporting brief was accepted by one of counsel for respondents on August 28, 1944.

Rule 38 (3) of the Rules of the Supreme Court provides:

> "Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court, or a justice thereof when the court is not in session), and due proof of service shall be filed with the clerk."

While we find no judicial authority to the effect that this rule is mandatory, it seems to us that the use of the word "shall" in describing the duties of the petitioner is a clear indication that the framers of the rule so intended. This has been so universally held to be true that we deem it unnecessary to cite any authority to that effect.

Ordinarily we should be most hesitant to raise such a point, but there are some features of the case which influence us in this respect.

This litigation has been pending for almost six years. The suit was commenced November 30, 1938. (R. 13.) Naturally the respondents, brothers and sisters of the decedent, have been continuously embarrassed by the seemingly endless publicity attending the long continued attempts of petitoners to assert their alleged rights; but of perhaps greater importance is the fact that the properties of the estate of Allen Johnston, deceased, have been held in uncertain tenure pending the final outcome of this litigation. The estate, of course, cannot be settled pending the outcome of the suit.

For these reasons we feel justified in urging this court to dismiss the petition.

2.

This Court is Without Jurisdiction Because No Federal Questions Were Raised or Constitutional Guaranties Invoked in the Courts Below.

The jurisdiction of this court is invoked by virtue of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C. A. Title 28, Sec. 344, (Petitioners Brief p. 12), which provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, *or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution.*" * * * (Italics supplied.)

Neither in the petition nor in petitioners brief is it set forth that any federal questions were raised or constitutional guaranties invoked by petitioners in the courts below of first and last resort. A reading of the record will disclose that, in fact, no such questions were ever before either of said courts, and that the petition for certiorari and brief submitted in this court by petitioners contain the first references to any such questions. In none of the pleadings in the Circuit Court of Fauquier County, nor in either of petitioners petitions for appeal to the Supreme Court of Appeals of Virginia, were any federal questions raised or Constitutional guaranties invoked.

It has been invariably held by this Court that federal questions not presented prior to the decision by the Court of last resort of the state will not be considered on a petition for writ of error or certiorari. *Mallers* v. *Commercial Loan etc. Co.*, 216 U. S. 613; 30 S. Ct. 438; 54 L. Ed. 638; *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; 30 S. Ct. 693; 54 L. Ed. 895. It must affirmatively appear that the state court of last resort had the federal questions before it and passed directly upon them; and this, even though the federal question should be raised on a petition for review which was denied. *Chicago etc. R. Co.* v. *McGuire*, 196 U. S. 128; 25 S. Ct. 200; 49 L. Ed. 413.

The only exception to the general rule which we can find is a case where the petitioner prevailed in the court of first resort, whose decision was later reversed in the state court of last resort. This Court in the case of *Grannis* v. *Ordean*, 234 U. S. 385; 34 S. Ct. 779, 782, held that where the Constitutional right was not infringed until the judgment of the state court of last resort, and petitioner raised the federal question on a petition for reargument in that court which considered the federal question in denying the petition, the Supreme Court had jurisdiction.

In the instant case the petitioners did not prevail in the Court of first resort. The Court sustained respondents' demurrrer to petitioners' amended bill. (R. 97.) Petition-

ers' first petition for appeal contained no reference to any federal question. (R. 1-13.) The final judgment of the court of first resort denied petitioners any relief and entered final judgment against them. (R. 196, 197.) Petitioners' second petition for appeal raised no federal question. (R. 102-132.) There was no petition for a rehearing presented to the Supreme Court of Appeal of Virginia. In short, the federal questions sought to be raised by petitioners here have never been considered by any of the Courts below. The petitioners' are not seeking a review of the decision of the Court below but are raising entirely new questions. Section 237 of the Judicial Code, *supra*, does not grant to this Court the power to consider such questions. As was said in *Mutual Life Ins. Co. of New York* v. *McGrew*, 188 U. S. 291; 313; 47 L. Ed. 480, 486.

> "We cannot retain jurisdiction on the ground of the assertion of a Federal right which * * * was not brought to the attention of the highest Court of the state *in any way whatever.*" (Italics supplied).

We, therefore, respectfully submit that the petition for certiorari should be denied.

3.

This Court is Without Jurisdiction Because There Are No Federal Questions Involved in the Case.

The petition contains six different questions for consideration (P. 6-10) none of which involves any federal question or any constitutional guaranty which would be the subject of jurisdiction of this Court. We shall consider these questions in the order and under the designations contained in the petition and petitioners' brief.

(A)

Petitioners' say in effect that the judgment of the Virginia Appellate Court deprived the petitioners of their property without due process of law and denied them the

equal protection of the laws in violation of the Fourteenth Amendment.

It is plain from petitioners statement that the error assigned relates to a *finding of fact* by the Circuit Court of Fauquier County, Virginia, which was later affirmed by the appellate court.

A casual reading of the record will disclose that under the facts of the case no court could have justly found that a common law marriage existed between Allen Johnston and Rebecca Edmonds (Now German). But, assuming that the facts were sufficient to justify such a finding and that the offspring of the relationship between those people was legitimatized by virtue of Section 5270 of the Virginia Code, there is nothing in the petition or brief to the effect that petitioners were deprived of their property without due process of law or that they were denied the equal protection of the laws of Virginia. They had their day in Court and their evidence was submitted and duly considered. It is certainly not within the province of this Court to review the decisions of State Courts on questions of fact. The case of *Meister* v. *Moore*, 96 U. S. 76, 24 L. Ed. 826, cited by petitioners, does not sustain such a contention. That case involves only the construction of the marriage statutes of Michigan.

(B)

It is urged by petitioners that the opinion of the Supreme Court of Appeals of Virginia is in conflict with the weight of authority including the decision of this Court in *Meister* v. *Moore, supra.*

Petitioners say that the effect of the Virginia court's decision in this case was to invalidate common law marriages in Virginia and that the Virginia marriage statutes should not be so construed because the weight of authority in other states is to the contrary. It is tacitly admitted that the Virginia Courts have invariably held that the Virginia marriage statutes preclude any valid common law marriage, and this is indeed true. *Offield* v. *Davis,* 100 Va. 250; 40

S. E. 910. It is interesting to note that petitioners did not urge in either of the Courts below that a common law marriage is valid in Virginia.

The construction of the Virginia statute by the State Court of last resort is binding upon this Court, *Gatewood* v. *North Carolina*, 203 U. S. 531; 27 S. Ct. 167; 51 L. Ed. 305, and petitioners do not urge that Virginia has no power to prescribe the requirements of a valid marriage within her jurisdiction. The opinion in the case of *Meister* v. *Moore, supra*, carefully limits the application of the holding to cases where the State Court has not construed the statute and says: "No doubt, a statute may take away a common law right." * * *

(C)

If we understand their contention correctly, petitioners urge that the Virginia Court erred in construing the Virginia statutes to invalidate common law marriages as discussed under Topic (B), and, further, that the Court erred in holding that Section 5270 of the Virginia Code did not legitimatize the issue of a marriage which might have been valid under the common law.

Even if the Court had so held, no federal question would have been presented, but such was not the case.

It was freely admitted that had the petitioners been able to establish all of the facts necessary to prove the existence of a common law marriage between Allen Johnston and Rebecca Edmonds, the offspring would have been legitimatized under the Virginia statute (Virginia Code Section 527). This point was settled in the case of *McClaugherty* v. *McClaugherty*, 21 S. E. (2) 761, 180 Va. 51.

The only question decided by the Court of first resort in its final judgment was that under the facts of the case the petitioners "have wholly failed to establish the existence of any common law marriage." (R. 197.) The Supreme Court of Appeals affirmed that judgment because it was of the opinion that the same was "plainly right." (R. 197.)

(D)

Under this topic the petitioners urge that the effect of the alleged erroneous holdings of the Virginia Court set forth under Topics (C) and (D) was to deprive the petitioners of their property without due process of law.

There is no contention that petitioners were not afforded their day in Court or that there was any irregularity in the proceedings in the Virginia courts. All of petitioners' evidence was submitted and considered by the Court, which found that such evidence was insufficient to establish the existence of a common law marriage.

Such a situation can give rise to no federal question which would subject this case to review by this Court.

(E)

This contention seems to us to be identical to the one raised in Topic (C) and we shall content ourselves with a reference to our discussion there.

(F)

Petitioners here contend that the Virginia Court failed to give effect to the state statute legitimatizing the issue of void marriages which resulted in denying to petitioner's the equal protection of the laws.

As we have seen the state statute was construed to legitimatize the infant petitioner, Carroll Franklin Johnston, in the event that a common law marriage between his parents could be established. The Court found as a matter of fact that no such marriage existed, and he could not under any flights of the imagination have been denied the equal protection of the laws.

CONCLUSION.

As we have seen, there were no federal questions raised or constitutional guaranties invoked in the Courts below; nor are there any federal questions involved in the case.

We, therefore, respectfully submit that the Court should deny the petition for certiorari to the Supreme Court of Appeals of Virginia.

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